FINALITY OF DECISION FOR PURPOSES OF APPEAL. — A principle inherited from the common law,[1] and to-day given wide effect by statute,[2] is that appeal or error will lie only after final decision.[3] But there seems to be much uncertainty as to just what a final decision is.[4] The great trouble is with the word "final." In its most common sense it means last, but last is a relative term; it invites the inquiry — last as to what? The answer may be expressed, *e.g.* "the final year of the war," but frequently it must be implied from the context, *e.g.* "the final match" — the context showing final to mean "last in a tournament." That is the case with "final decision" as used above. With different contexts it might well mean several different things: Now the true context seems clear enough. The rule was formulated to answer the question whether appeal should be allowed from the various decisions rendered in the progress of an action. The answer is that appeal may be taken only after final decision. The context shows that final can only mean "last in the action." [5]

And authority supports this analysis. In one of the earliest cases on the subject one finds that "it was resolved that no writ of error lies till the last judgment." [6] To be sure, the orthodox modern definition of final decision is "one that completely determines the action," [7] but this is just another way of describing the same legal situation, since the decision which completely determines must be "last in the action." [8]

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[1] Metcalfe's Case, 11 Coke, 68 (1614); Samuel *v.* Judin, 6 East, 333, 102 Reprint 1314 (1805).

[2] See, for example, JUD. CODE, §§ 128, 210, 237; COMP. STAT., §§ 1120, 1000, 1214, providing respectively that the Circuit Court of Appeals will review certain final decisions of the District Courts, that the Supreme Court will review certain other final decisions of the District Courts, and will review certain final decisions of the highest court of a state.

[3] The rule originated in connection with writs of error, and was later applied to appeals at law. Originally it did not apply in equity, but modern statutes have generally made it applicable both at law and in equity. Does it apply to *certiorari?* Apparently not at common law, but it frequently seems to in the United States. See POWELL ON APPELLATE PROCEEDINGS, 348; JUD. CODE, § 237; COMP. STAT., § 1214, providing for *certiorari* in certain cases after final decision.

[4] In *In re* Jerome, [1907] 2 Ch. 145, 146, Cozens-Hardy, M. R., after commenting on the difficulty of this question, remarked that recently the full bench had been summoned to lay down some rule on the matter, but declined so to do, confining itself to the decision of the particular case, and this course he proposed to follow.

And in McGourkey *v.* Toledo, etc. Ry. Co., 146 U. S. 536, 544 (1892), it is stated: "Probably no question of equity practice has been the subject of more frequent discusion in this court than the finality of decrees. The cases, it must be conceded, are not altogether harmonious."

[5] And the policy of the rule is also most fully carried out by such interpretation. That policy has been stated by no less an authority than Marshall as being to prevent the delay and expense incident to repeated trials of error on appeal from decisions reached in the progress of an action, but instead to have one trial of error on appeal from final decision. See opinion of Marshall, C. J., in United States *v.* Bailey, 9 Pet. (U. S.) 267, 272 (1835); McLish *v.* Roff, 141 U. S. 661, 665 (1891). This rule also renders unnecessary trials of error in those cases in which the court itself later corrects its own errors, or in which the aggrieved party nevertheless recovers.

[6] See Metcalfe's Case, *supra*, 70.

[7] Belt *v.* Davis, 1 Cal. 134 (1850); Bostwick *v.* Brinkerhoff, 106 U. S. 3 (1882). See FREEMAN ON JUDGMENTS, § 16.

[8] Whichever expression is used, one limitation should be noted. A decision is regarded as final although all the matters involved in the case are not settled, provided

"Last in the action," however, seems the better definition, as it brings out the true meaning of final,[9] whereas the orthodox definition not only effectively conceals that meaning, but actually leads to confusion with another meaning of the word. This other meaning will be seen if one compares the use of the word in the expressions "the final game of a series" and "the final result of a series." In the former, final is used in the sense considered above of "last of several," but in the latter it is merely used in an indefinite sense, indicating in general that the matter was finally settled after having long been in doubt. Now the orthodox definition leads one to suppose that a decision is final not because of being last in the action, but because of being a final determination of the action. Indeed this expression is frequently found in the cases.[10] In it of course final is used in the indefinite sense. That is why the orthodox definition leads to confusion with that sense. To be sure where the indefinite sense is applied to "determination of the action"[11] no wrong result will follow, since the decision which determines the action is also final in the true sense of last in the action. But in other cases the indefinite sense will bring about wrong results, since many decisions are final in that sense which are not last in the action.

It has been stated above that authority supports the conclusion that the true meaning of final is last in the action. The contrary decisions seem broadly to fall within two classes. In the first place there are those which hold that a decision is final if it involves the immediate payment of money,[12] or determines a property right and is immediately to be carried into execution,[13] or, more generally, if it "divests some right in such manner as to put it out of the power of the court to place the parties in their original positions after the expiration of the term."[14] Final is here used as indicating irrevocableness of the matter decided. These decisions are final in the same way that a decision to break a bottle is final. This is the sense in which the word is

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any further steps necessary to dispose of the action would be ministerial rather than judicial. It is final if it is the last judicial decision in the action, or if it completely determines the action judicially. Thus a judgment by default for damages, which, however, must be assessed by a jury, as in tort, is interlocutory; but where damages are readily ascertainable, as in debt, no interlocutory judgment is necessary. Maury *v.* Roberts, 27 Miss. 225 (1854). See BLACK ON JUDGMENTS, § 28. And this is the line used to differentiate those difficult cases in equity where there is a decree settling many of the issues, but leaving the case somewhat open for a reference to a master. See Lodge *v.* Twell, 135 U. S. 232 (1889); McGourkey *v.* Toledo, etc. Ry. Co., 146 U. S. 536 (1892); BLACK ON JUDGMENTS, §§ 44, 45.

[9] It seems extraordinary how seldom this natural meaning of final as "last in the action" has been pointed out. Only one modern case has been noted which draws attention to this meaning of the word. See Bossier *v.* Hollingsworth, 117 La. 221, 226, 41 So. 553, 555 (1906).

[10] See Walb *v.* Eshelman, 176 Ind. 253, 260, 94 N. E. 566, 570 (1911); BLACK ON JUDGMENTS, §§ 21, 22; FREEMAN ON JUDGMENTS, § 16.

[11] "The final determination of an action" is not a definition of "final decision" but of "final final decision." The true sense of final is used up in saying "the determination of an action" (since final means "last in the action," *e.g.* "which determines the action"), and to say "the final determination of an action" is to borrow another final from somewhere and use it in the indefinite sense.

[12] See City of Eau Claire *v.* Payson, 107 Fed. 552 (1901).

[13] See Forgay *v.* Conrad, 6 How. (U. S.) 201, 204 (1848).

[14] See City of Batesville *v.* Ball, 100 Ark. 496, 500, 140 S. W. 712, 714 (1911).

used in statutes providing that certain decisions of a court shall be final,[15] meaning unappealable; but it will hardly be contended that this is the correct sense of final as used in the rule.

Secondly, there are those cases which hold that the determination of a separable or collateral matter is final.[16] In these cases final seems to be used in that indefinite sense just discussed. If that is the correct sense of final, the rule is meaningless. Any decision may be regarded as final in that sense; every decision is final to the extent that it decides something. Why then limit the application of this sense to the case of the decision of a separable matter? Of course if the matter is so separable that it is really a separate action, then the decision last in that action is final.[17] That was the only question seriously considered in the recent case of *Coastwise Lumber and Supply Co.* v. *United States*,[18] in which an order refusing a petition for the return of books and papers seized in connection with a criminal investigation was held interlocutory. As the petition was made only after the petitioner had been indicted, it could hardly have been held a separate action.[19]

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[15] See, for example, JUD. CODE, § 128; COMP. STAT., § 1120, providing that certain decisions of the Circuit Court of Appeals shall be final.

[16] See Cassatt *v.* Mitchell Coal Co., 150 Fed. 32 (1907); Brush Electric Co., *v.* Electric Improvement Co., 51 Fed. 557 (1892); Jackson *v.* Jackson, 175 Fed. 710 (1909). See WILLIAMS, JURISDICTION AND PRACTICE OF FEDERAL COURTS, c. 20, § 5 *et seq.*

[17] At common law a proceeding in error was technically a separate action. Judgments of reversal have been held final on that account. In substance, however, such a judgment seems interlocutory, and the weight of modern authority is to that effect. Haseltine *v.* Bank, 183 U. S. 130 (1901); Schlosser *v.* Hemphill, 198 U. S. 173 (1906). See POWELL ON APPELLATE PROCEEDINGS, 407.

[18] 259 Fed. 847 (C. C. A., 2d Circ.) (1919).

[19] Commentators frequently state all these views of finality without mentioning any inconsistency between them. Freeman, however, in his work on Judgments consistently follows the first view, and classes cases upholding the other views as in the nature of exceptions. See FREEMAN ON JUDGMENTS, § 35. Williams would regard as final a decision final as to some particular matter provided that particular matter could be regarded as a distinct and separate *lis* or controversy. But he adds that the severability is sometimes "artificially imported by method of judicial treatment." See WILLIAMS, JURISDICTION AND PRACTICE OF FEDERAL COURTS, c. 20, § 3.

Upon investigation it is found that much of the supposed authority for the two minority views will not bear critical examination. Local statutes enlarging the common-law rule are frequently found to be involved. This is the case with Baldwin *v.* Foss, 71 Ia. 389, 32 N. W. 389 (1887), cited as authority for the proposition that an order refusing to grant a new trial is final, and with *In re* Graef, 30 Minn. 358, 16 N. W. 395 (1883), cited to show that a decree appointing a receiver (but not settling the issues) is final. Some statements would seem to confine the doctrine that the determination of a separable part of an action is final to cases where the matter determined affects only non-parties to the main litigation, and is quite disconnected from the subject matter of the main litigation. Thus in Alexander *v.* United States, 201 U. S. 117 (1906), while it is held that an order to a witness to produce evidence is interlocutory, there is a *dictum* to the effect that a decision fining a witness for contempt would be final. It seems that cases applying the doctrine in this fashion can be supported on the orthodox view, as the matter decided might well be considered so severable as really to constitute a separate action. And lastly, many of the decisions supposed to support these views can be explained on the ground that further steps necessary to dispose of the case were in essence ministerial only. See note 8, *supra*. This is the case with Forgay *v.* Conrad, note 13, *supra*, *dicta* from which are universally cited in cases departing from the orthodox view.

But on either or both of the two minority views the following decisions have some-

Logically, nothing can be said for these two lines of decisions. Perhaps they may be explained as a straining to depart from the true rule in cases where it works hardship. For it does work hardship in certain cases: there are certain interlocutory decisions which, if erroneous, cause prejudice that cannot be removed by reversal on appeal from final decision.[20] The proper remedy would be to amend the rule[21] so as to allow appeal from interlocutory decisions in those cases. But courts could not do that, so they seem to have reached the same result by applying final in senses quite foreign to the true sense of the rule. Some courts must have realized that they were doing this, for one finds such telltale expressions as "final for purposes of appeal"[22] — a sort of constructive finality. And once these other senses are admitted at all, it then becomes necessary to draw fine distinctions to limit their application. The natural result of such a process has been confusion. The state of the law on this subject aptly illustrates the baneful results that follow where courts attempt to accomplish indirectly what they cannot accomplish directly.

BOOK REVIEWS

MARINE INSURANCE: ITS PRINCIPLES AND PRACTICE. By William B. Winter New York: McGraw Hill Book Company, Incorporated. 1919. pp. 433.

In a form compact and serviceable are here set forth the substance of the author's course of lectures delivered in the School of Commerce of the New York University. Besides treating of the history and theory of this branch of insurance, Mr. Winter explains in full administrative detail the practical management of a modern insurance corporation, in which field he speaks with the authority of his own official connection with one of the largest marine insurance companies in this country. The work is not a law treatise. In a clear and ordered arrangement he outlines the historic growth of marine insurance in this country and shows how its scope has been varied to meet the multiplied requirements of present-day commerce. But even such a manual cannot entirely ignore the controverted historical question of where sea insurance began.

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times been held final: decree granting alimony *pendente lite*, Daniels *v.* Daniels, 9 Col. 133, 10 Pac. 657 (1886); *contra* Beatty *v.* Beatty, 105 Va. 213, 53 S. E. 2 (1906); judgment dismissing an attachment, Bruce *v.* Conyers, 54 Ga. 678 (1875); *contra* Cutter *v.* Gumberts, 8 Ark. 449 (1848); order appointing a receiver to take possession at once. Clark *v.* Raymond, 84 Ia. 251, 50 N. W. 1068 (1892); *contra* Kansas Rolling Mill Co. *v.* A. T. & Santa Fe Ry. Co., 31 Kan. 90, 1 Pac. 274 (1883); order removing or refusing to remove a cause to another court, McMillan *v.* State, 68 Md. 307 (1887); *contra* Jackson *v.* Alabama, etc, Ry. Co., 58 Miss. 648 (1881).

[20] And the rule also works badly in the case of interlocutory decisions which call for extended accounting that is found to be mere time wasted if the decision is later reversed. This situation has frequently arisen in patent litigation. See Richmond *v.* Atwood, 52 Fed. 10 (1892).

[21] The rule has been changed by statute in England and in many of the United States. See, for example, JUD. CODE, § 129; COMP. STAT., § 1121, allowing appeal in certain cases from interlocutory orders granting an injunction or appointing a receiver.

[22] See Brush Electric Co. *v.* Electric Improvement Co., note 16, *supra*, at p. 559. And in Forgay *v.* Conrad, note 13, *supra*, at p. 203, the court, speaking through Taney, C. J., although holding the decree final, said: "Undoubtedly it is not final in the strict technical sense of the term."